

EXHIBIT G
to
DECLARATION OF
JAMES HENRY BARTOLOMEI III

December 6, 2023 hearing transcript

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RAFAEL MARCHANTE, : Case No.: 23-CV-8864

Plaintiff, :

v. :

REUTERS AMERICA LLC, et al. , : New York, New York

Defendant. : December 6, 2023

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TRANSCRIPT OF STATUS CONFERENCE HEARING

BEFORE THE HONORABLE DALE E. HO

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: JAMES HENRY BARTOLOMEI, III PA
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For Plaintiff: CERA LLP
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APPEARANCES CONTINUED

For Defendant: BALLARD SPAHR LLP
BY: Thomas Byrne Sullivan, Esq.
Catherine Seibel, Esq.
1675 Broadway - 19th Floor
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1 THE DEPUTY CLERK: Good afternoon. This
2 is Nicole Morales, Judge Ho's Courtroom Deputy. I'm
3 just checking in to see who just entered the
4 conference.

5 Hello?

6 MS. MARKERT: Hi, this is Pamela Markert
7 on behalf of plaintiff, Rafael Marchante.

8 THE DEPUTY CLERK: Hello. I also see
9 another.

10 MR. HOBEN: Yeah, you also have Bryan
11 Hoben on behalf of plaintiffs as well.

12 THE DEPUTY CLERK: Afternoon to you both.

13 MS. MARKERT: Our colleague, James
14 Bartolomei, will be joining, and he will be speaking
15 on behalf of plaintiffs.

16 THE DEPUTY CLERK: Awesome. Thank you so
17 much. Do you know if Solomon Cera will be joining?

18 MS. MARKERT: He will not.

19 THE DEPUTY CLERK: Not, okay. Thank you
20 so much.

21 Good afternoon. I see two people just
22 entered the conference. Just checking in to see who
23 has come in.

24 MR. SULLIVAN: Hi. Good afternoon. My
25 name is Thomas Sullivan, Ballard Spahr LLP, for the

1 defendants.

2 MR. BARTOLOMEI: Good afternoon. This is
3 James Bartolomei, and I am counsel for plaintiff,
4 Rafael Marchante.

5 THE DEPUTY CLERK: Good afternoon to you
6 both.

7 Mr. Sullivan, do you know if Ms.
8 Catherine Seibel will be joining?

9 MR. SULLIVAN: Yes, I believe she also
10 intends to join.

11 THE DEPUTY CLERK: Okay. Just wanted to
12 make sure. Thank you so much.

13 MR. SULLIVAN: You're welcome.

14 THE DEPUTY CLERK: Good afternoon. I'm
15 just checking to see who just entered the
16 conference.

17 Hello?

18 MS. SEIBEL: Hi, this is Catherine
19 Seibel, counsel for the defendants, on behalf of
20 Ballard Spahr.

21 THE DEPUTY CLERK: Hi, good afternoon. I
22 believe that is everyone. As long as you're all
23 ready, I can bring the judge into the conference.

24 MR. BARTOLOMEI: Ma'am, are there any
25 other lawyers that have -- represent the plaintiffs

1 that have -- in a waiting room, or --

2 THE DEPUTY CLERK: Somebody just popped
3 out but came back on.

4 MS. MARKERT: Yes. In an attempt to mute
5 myself, I actually permanently muted myself and had
6 to dial back in.

7 Jim, both Bryan and I are on, on behalf
8 of the plaintiffs, with you.

9 THE DEPUTY CLERK: Okay. So we're all
10 ready then?

11 MR. SULLIVAN: Yes. There's no one else
12 from the defendants. Defendants are ready. Thank
13 you.

14 THE DEPUTY CLERK: Okay. Great. All
15 right. Just give me a moment.

16 The judge has entered the conference, so
17 we can begin. The Honorable Dale E. Ho presiding in
18 the matter of Marchante v. Reuters America, LLC, et
19 al; Docket Number: 23-cv-8864.

20 Counsel, can you please state your names
21 for the record, starting with the plaintiffs.

22 MR. BARTOLOMEI: Good afternoon, Your
23 Honor. This is James Bartolomei from the Duncan
24 firm, and I represent Rafael Marchante.

25 MS. MARKERT: Pamela Markert from Cera,

1 LLP, and I also represent plaintiff, Rafael
2 Marchante.

3 MR. HOBEN: This is Bryan Hoben from
4 Hoben law, and I also represent plaintiff, Rafael
5 Marchante.

6 MR. SULLIVAN: Good afternoon, Your
7 Honor. This is Thomas Sullivan, Ballard Spahr, LLP
8 on behalf of the defendants.

9 MS. SEIBEL: Good afternoon. This is
10 Catherine Seibel, also Ballard Spahr, also on behalf
11 of the defendants.

12 THE DEPUTY CLERK: Counsel, this is a
13 reminder that this is a public proceeding. Members
14 of the public and press can access the proceeding
15 with a public dial-in number. Please be aware that
16 just as if you were physically present in the
17 courtroom, you are prohibited from recording,
18 rebroadcasting or disseminating any recording of
19 court proceedings, including this one.

20 Your Honor.

21 THE COURT: Good afternoon, and thank
22 you, everyone, for joining this teleconference.

23 We're here on defendant's motion to stay
24 discovery pending resolution of their motion to
25 dismiss, which hasn't been fully briefed yet. I

1 want to hear from the parties, and I think the way
2 I'd like to proceed is, I'd like to first start with
3 the plaintiffs to give me a very quick overview of
4 the case and what discovery it is that you're
5 seeking.

6 And then maybe I'll come to the
7 defendants after that, and you can say whatever you
8 want in response to the plaintiffs in terms of their
9 overview of the case. And tell me why you think a
10 stay of discovery would be appropriate. And then
11 I'll probably come back to the plaintiffs after
12 that, and I'll have questions for each of you along
13 the way. And if there's anything else you want to
14 address after we've gone through all that, then I'll
15 give you an opportunity to do so.

16 One housekeeping matter before we get
17 going. We don't have a court reporter, but this is
18 being recorded so that if anyone wants a transcript
19 later, you can have a court reporter transcribe it.
20 But one thing that's helpful in that process is if
21 folks could always say their name when they start
22 speaking, that'll make it a lot easier to produce a
23 clean transcript. That is, unless I say your name
24 first when inviting you to speak, in which case, I
25 think the transcript will be perfectly clear.

1 So with that, why don't we get started.
2 And I don't know who's going to want to speak for
3 the plaintiffs. So this is one of those occasions
4 where it would be nice to say your name before you
5 start speaking. But why don't I start with counsel
6 for the plaintiff, and just give me a quick overview
7 of the case and a sense of the kind of discovery
8 that you're seeking.

9 MR. BARTOLOMEI: Good afternoon, Your
10 Honor. It's a pleasure to be before your court.
11 This is James Bartolomei, and I'll be speaking on
12 behalf of the plaintiffs today.

13 To start with Your Honor's first request,
14 this case is, you know, very simply, a copyright
15 infringement case for U.S. copyright infringement
16 claims for conduct solely in the United States
17 against two U.S. Reuters defendants.

18 My client, Rafael Marchante, is an
19 award-winning professional photographer that has
20 been -- he was a wire service photographer for over
21 20 years. He provided services to Reuters starting
22 first, I believe, in Spain. He spent a number of
23 years in Morocco. He spent a number of years in
24 Portugal. Spent some time in the Middle East,
25 Africa. And captured roughly 20,000 photographs

1 during that time period. One of the good things in
2 this case is that he owns the copyright to each of
3 these photos, so that element of copyright
4 infringement is not in dispute.

5 Sometime in late 2020, because of
6 COVID -- and when I use the term "Reuters," I'll try
7 to be specific, but generally he had a freelance
8 royalty agreement, which provided that Reuters had
9 basically three requirements throughout the entirety
10 of his time of service, which started in 2002 and
11 ended in 2020.

12 So during that time period, Reuters was
13 required to pay him royalties, basically 25% of the
14 net sales of any photographs that he captured. They
15 were required to pay him on time, they were required
16 to pay him in full, and they were required to
17 provide him backup statements during that time.

18 So during the entire 20-year period,
19 despite asking, he was never ever provided royalty
20 statements. And one of the challenges when you're
21 working for a big media conglomerate like Reuters is
22 if you rock the boat and you do too many things and
23 ask too many questions, they're going to get rid of
24 you.

25 And in any event, when he was terminated,

1 he began suspecting that he had not been paid his
2 royalty payments, partly because he never even had a
3 copy of the royalty statements that were required to
4 be provided. So roughly, I don't know, six or seven
5 times after asking, he had sent a termination notice
6 to Reuters. Sometime -- I'm talking about Reuters,
7 Spain -- sometime in April of 2021, notifying them
8 that he was terminating the royalty agreement. And
9 eventually, during the next two years, he determined
10 that they had materially and essentially breached
11 this royalty agreement, which effectively terminates
12 Reuters' license.

13 And to be specific, Reuters created this
14 royalty agreement. They're the ones -- I believe
15 discovery would show that somebody within their UK
16 office -- because it's written in English -- in the
17 United Kingdom office, perhaps drafted this royalty
18 agreement. It's written in English, and that the
19 royalty agreement was really meant to compensate him
20 for the sale of the -- the after-sale of these
21 photographs, which, over a 20-year period, he wasn't
22 making that much money. He was probably making
23 about 3- or 4,000 U.S. dollars at most at any given
24 time.

25 And this was an agreement that was meant

1 to compensate him for that. So he sent notice of
2 termination. Reuters -- I think counsel out of
3 Poland went back and forth and communicated with
4 him. And eventually Reuters' response was, it's not
5 terminated, the contract is still valid, we still
6 have a license to your photographs.

7 It wasn't until he decided sometime this
8 past summer to engage counsel in the United States
9 to say, listen, I've got this issue with Reuters.
10 They are exploiting my photographs in the United
11 States. We've got hundreds and hundreds of licenses
12 that were sold to U.S. entities in New York. And,
13 invariably, they're committing copyright
14 infringement. They're exploiting my photographs,
15 and they no longer have a valid license.

16 So here we are, we filed suit, I believe,
17 on October 9 of this year. Two days later, Reuters
18 filed, in response to that suit, our suit here in
19 the U.S., their own case in Spain, through a Reuters
20 entity. That's sort of the high level overview.
21 We've got 20,000 photographs at issue. All of them
22 are subject to copyright infringement claims here in
23 the U.S. There's a sister statute, as Your Honor
24 may know, the copyright management information
25 violations under the DMCA, which plaintiff is also

1 making claims for.

2 And so the Court knows by and large, both
3 parties, including plaintiffs, have the lion's share
4 of documents that will prove on its face that
5 Reuters materially breached this agreement.

6 Now, the real question comes down to what
7 exactly else is out there in the universe of
8 discovery. So I think there's really two buckets of
9 categories of discovery, one of which is all going
10 to be in the time period for infringements in the
11 U.S. And the rest basically is some e-mails, some
12 royalty payments, which we have all the backup
13 statements for, and communications internally
14 between Reuters' witnesses that are probably all
15 based in either the U.K. or Poland or the United
16 States for that matter.

17 So there's actually very little to do
18 with Spain in terms of the buckets of evidence
19 required in this case to allow discovery to proceed,
20 of which the only real witness that we think is
21 germane to any of those issues is our client, Mr.
22 Marchante. And aside from that, we think that
23 discovery is not overly complex. This is, I hate to
24 call it a garden variety copyright infringement
25 case. The only wrinkle here is that there's a

1 question of the materiality of the breach of the
2 licensing agreement, which is a fact question. And
3 there's also -- I would submit as an affirmative
4 defense that's really never appropriate to be raised
5 on the motion to submit level.

6 So, invariably, plaintiff does not
7 believe that there's really that much discovery to
8 be done. And we suggested six months in the
9 proposed scheduling order, which Reuters agreed to,
10 but truth be told, we could probably do it in less
11 time if we had to.

12 And, you know, with that, Your Honor,
13 I'll take any questions or -- that's all I have on
14 that.

15 THE COURT: Okay. I think I understand
16 your views and have at least a sense now of what
17 discovery is going to be involved in this case. I'm
18 sure I'm going to have questions for you later.

19 But why don't I turn to counsel for the
20 defendants. And I don't know if it'll be Mr.
21 Sullivan or Ms. Seibel, but I'll invite you to also
22 give a brief overview of the case to the extent that
23 you want to, but I'm most interested in why you
24 think a stay of discovery would be appropriate right
25 now.

1 MR. SULLIVAN: And, Your Honor, this is
2 Mr. Sullivan, and I'll be addressing this for the
3 defendants.

4 First, on the background of the case and
5 the discovery required, this is fundamentally a case
6 about Spanish issues. While the plaintiff has
7 chosen to sue two Reuters American entities, he
8 himself is a Spanish citizen. He took the majority
9 of the photographs in either Spain, Portugal or
10 Morocco. His relationship was with Reuters Spanish
11 affiliate, not either of the American affiliates.

12 And the major factual issues in the case
13 are going to concern how those royalties were paid
14 that plaintiff's counsel addressed, and his contract
15 relationship with Reuters, which was with Reuters
16 Spanish entity.

17 So while we agree that with respect to
18 electronic discovery, Reuters, in order to
19 facilitate and make this case go forward more
20 easily, you know, is not going to stand on
21 distinctions between the various Reuters corporate
22 entities. The witnesses in this case are almost
23 exclusively going to be in Spain. The plaintiff is
24 in Spain. The photo editors who assigned the
25 plaintiff to various photo assignments were in

1 Spain. The editorial operations manager, who both
2 calculated the royalties and paid them, is in Spain.
3 That is the locus of this action.

4 The fundamental question here is, under
5 Spanish law, did the plaintiff have the ability to
6 terminate the contract because a material breach
7 occurred, and did he follow the required procedures
8 to terminate the contract if he determined there was
9 a material breach? All of that really comes down to
10 questions of what Spanish law allows, and the
11 communications that he made to Reuters Spanish
12 affiliate. That's whom the termination letter was
13 sent to.

14 So in our view, the focus of this case
15 really is on Spain. You know, as the plaintiff's
16 counsel has said, it will be a straightforward
17 discovery process. As he acknowledged, they've
18 requested a longer than usual discovery period in
19 this case, longer than under this Court's sample
20 discovery order. And even if the discovery would
21 involve entities other than Spain, like the U.K., as
22 they mentioned, that too calls for this case to be
23 heard in Spain. It's much closer jurisdiction, much
24 closer geographically than the United States.
25 Poland as well.

1 So that's our view on the scope of
2 discovery. Unless the Court has questions on that,
3 I can go into the motion itself.

4 THE COURT: Yeah, that's fine, and we
5 can. Just one quick question. I thought I
6 understood from Mr. Bartolomei, and maybe I
7 misunderstood, that the length of the requested
8 discovery period in the case management plan wasn't
9 something that the plaintiffs thought was necessary.
10 That that was something that the parties came to an
11 agreement on, but the plaintiffs thought they could
12 get it done in, you know, a more standard four
13 months or so.

14 Is that wrong? Do you have a different
15 view as to how long discovery in the case should
16 take?

17 MR. SULLIVAN: I think in our view, there
18 are potential complications in -- when doing
19 interpretation of the witnesses, getting the
20 witnesses here or traveling there, or figuring out
21 the logistics of that. But no, my point was simply
22 that plaintiffs had agreed to that extended
23 discovery period, so they were not suggesting that
24 it was a shorter period of time. It was also not in
25 our initiative that the discovery period had been

1 longer. I had suggested shorter deadlines
2 originally.

3 THE COURT: I understand. Okay. Thank
4 you, Mr. Sullivan.

5 Let's turn to the motion first.

6 MR. BARTOLOMEI: Your Honor, may I also
7 respond to your question regarding the six-month
8 issue?

9 THE COURT: Is that Mr. Bartolomei?

10 MR. BARTOLOMEI: It is. I'm sorry, Mr.
11 Bartolomei.

12 THE COURT: Sure. But briefly, please,
13 because I want to let Mr. Sullivan -- I want to get
14 to the motion.

15 MR. BARTOLOMEI: No, understood. And
16 typically, under the Court's model order, four
17 months is generally relatively short. So plaintiff
18 would not oppose or object to reducing it to four
19 months if we had to.

20 THE COURT: Oh, was that -- okay.

21 Is that it, Mr. Bartolomei?

22 MR. BARTOLOMEI: Yes. Correct, yes.

23 THE COURT: Understood.

24 Mr. Sullivan, turning back to you.

25 MR. SULLIVAN: Thank you -- excuse me.

1 Thank you, Your Honor.

2 I wanted to start by just discussing the
3 sort of procedural issues that the plaintiff raised
4 in his opposition letter yesterday.

5 First of all, we believe this is properly
6 raised by a discovery letter. A motion to stay
7 discovery is effectively a motion for a protective
8 order under Rule 26. And Local Rule 37.2 requires a
9 motion under Rule 26 to be brought by a request for
10 an informal discovery conference like this one.

11 Second, this is not a motion for
12 reconsideration of any order previously issued by
13 the Court. There was prior letter briefing in this
14 case, as plaintiffs allege, but that letter briefing
15 was on two other topics. Our request for an
16 extension of time to answer and for a bifurcated
17 briefing schedule on our motion to dismiss. We did
18 not seek a stay in that briefing, and the Court
19 didn't order that there was to be no stay.

20 In the memo endorsement, granting that
21 letter motion in part, the Court apprised the
22 parties that pendency of any motion to dismiss does
23 not generally provide cause to stay discovery.
24 We're not arguing here that every motion to dismiss
25 requires a stay of discovery, but rather the

1 specific circumstances here justify it.

2 And then finally, on the meet and confer
3 requirement, the fact that plaintiffs disagree with
4 our reason for seeking a stay doesn't mean that we
5 failed to meet and confer. We did, and we simply
6 reached an impasse where it's appropriate to bring
7 it before the Court.

8 On the motion itself, we believe good
9 cause exists for a stay, as outlined in our letter.

10 First of all, as the Second Circuit held
11 in the *TransUnion* case, because the lack of a stay
12 here would effectively moot the purpose of our forum
13 non conveniens, as well as our comity portions of
14 our motion, we believe it's appropriate to receive a
15 stay here.

16 If the case proceeds, the defendants
17 would lose the benefit of that motion because they'd
18 be forced to litigate in a forum they believe is
19 inconvenient, and that the case should be more
20 appropriately held in Spain. It would defeat the
21 purpose of the motions.

22 On the three factors; first, on
23 discovery, we've discussed that a bit already, but
24 we believe that discoveries sought here will be
25 broad and burdensome. Fundamentally, this is a case

1 about Spain and what happened there. Royalties were
2 calculated and paid in Spain, and the witnesses
3 involved in that are Spanish.

4 In addition, in discussing whether any
5 breach was material, the parties are necessarily
6 going to need to conduct discovery into other ways
7 in which the plaintiff is compensated. For example,
8 under the freelancer agreement, he also received
9 assignment fees. Those were also paid in Spain.

10 And plaintiff's counsel, in discussing
11 the background of the case, acknowledged that he
12 intends to seek additional areas of discovery, such
13 as the drafting and creation of the royalty
14 agreement itself, which would also be burdensome and
15 likely involve some privilege issues that this party
16 would have to litigate.

17 At the end of the day here on discovery
18 issues, Reuters Spain was the counterparty, and the
19 party to whom the termination letter was addressed.
20 And discovery will necessarily involve issues
21 involving Reuters Spain that are based in Spain.

22 On the second factor, the strength of the
23 motion, I think it's clear from a read of our motion
24 that it is potentially dispositive. If it was
25 granted on any of the three grounds, this case would

1 end in its entirety or on the comity ground, it
2 would be stayed in its entirety pending disposition
3 of the Spanish action. And it, at the very least,
4 appears not to be unfounded in the law. That's the
5 standard in the three cases cited in our letter, the
6 *Alafa View, Integrated Systems & Power*, and *NIV*
7 cases. Plaintiff cites a different standard in the
8 *Kaplan* case, that a strong showing that plaintiff's
9 claim is unmeritorious.

10 That standard, as *Kaplan* cites, comes
11 from the *Hong Leong Financial Limited v. Pinnacle*
12 *Performance* case; that's 297 F.R.D. 69. It's from
13 this District in 2013, Judge Gorenstein. And in
14 that case, Judge Gorenstein acknowledged that courts
15 in the Second Circuit have, "often stated that a
16 stay of discovery is appropriate where a motion does
17 not appear to be without foundation in law."

18 While Judge Gorenstein disagreed with
19 that and used the strong showing standard instead,
20 he acknowledged that he was imposing a different
21 standard than other judges in this court have done.

22 And even under plaintiff's preferred
23 formulation, we've met that showing here. Plaintiff
24 cites other arguments they believe we could have
25 raised but don't actually address the arguments

1 made. They largely, simply state the conclusion
2 that they think they're not sufficient.

3 On the question they raise about a
4 declaration that a Spanish court could adjudicate
5 U.S. copyright claims, they cite no case law in
6 support of the proposition that such a declaration
7 is required, and the law is actually to the
8 contrary. For example, earlier this year, a judge
9 of this court rejected an argument that a Portuguese
10 court was not an adequate forum because U.S. courts
11 had exclusive jurisdiction over U.S. copyright
12 claims. That's *Paulo versus Agence France-Presse*,
13 2023 Westlaw 2707201 S.D.N.Y., March 30, 2023.
14 Plaintiff's counsel are familiar with that case.
15 Two of them litigated it, so they're familiar with
16 the idea that that is simply not the law in the
17 Southern District that U.S. copyright claims need to
18 be litigated to the intellectual property basis, not
19 whether U.S. law explicitly could be litigated in a
20 foreign jurisdiction.

21 The other thing I want to say about
22 *Kaplan* is that it's a very, very different case from
23 this one. In *Kaplan*, because of various procedural
24 wrangling, the plaintiff had been waiting 14 years
25 for discovery, an extended delay, much more extended

1 than the several months we're talking about here.
2 There have been numerous prior rulings on the
3 sufficiency of the pleadings where the Court had
4 found they were sufficient. And in that case, the
5 defendants were seeking a stay, not while a motion
6 to dismiss in that case was pending, but while there
7 was a motion to dismiss pending in a sister case
8 where some of the discovery wouldn't be overlapping.
9 So none of those factors are existent here.

10 Third and last, on the unfair prejudice
11 factor, there would be no unfair prejudice if a
12 temporary stay is put in place while the Court
13 considers the motion. If granted, as I noted
14 before, the motion will dispose of the entire case.
15 Therefore, it will not substantially or unduly
16 delay, but rather avoid unnecessary duplication of
17 effort.

18 This motion, based on the currently
19 existing briefing schedule will be briefed by the
20 end of January. So less than two months from now,
21 and less than two months from when the motion was
22 filed. That's not a very long period of time.
23 Plaintiff waited nearly two years to file any claims
24 after he says he was aware of them. So a two-month
25 delay is not substantial based on that.

1 And the number of remaining arguments
2 they make in their opposition brief on this issue,
3 on the prejudice issue, don't discuss why a stay
4 would be prejudicial. Instead, they discuss why
5 they believe Spain is not a convenient forum. But
6 that is not the test here. It's whether a stay is
7 prejudicial while the motion is pending.

8 On the specific factors, while plaintiff
9 makes accusations about forum shopping, the
10 freelancer agreement states that the Spanish court
11 in Barcelona is an appropriate forum for disputes
12 arising out of the contract. It's where all the
13 parties intended for any dispute to be heard.
14 Plaintiff has chosen to bring a U.S. copyright claim
15 here. While that's the jurisdictional provision,
16 the agreement is not exclusive, he can hardly argue
17 that it's a surprise to be hauled into Spanish court
18 based on the contract.

19 Plaintiff has not substantiated his
20 claim. He is unable to hire Spanish counsel. To
21 our knowledge, he was previously represented by
22 Portuguese counsel in this dispute, and he's
23 obviously been able to hire American counsel here.
24 To the extent an inability to hire counsel goes to a
25 forum non conveniens analysis, the Second Circuit

1 has also rejected that as being a determinative
2 factor. It's just one factor in the analysis; and
3 that's in the *Murray v. BBC* case.

4 So for all of these reasons and the
5 reasons stated in our letter, we believe a stay
6 would be appropriate here to allow the Court time to
7 rule on the party's motion -- or the defendant's
8 motion, avoid unnecessary duplicative effort, and we
9 do not believe it would be prejudicial to the
10 plaintiff.

11 THE COURT: Thank you, Mr. Sullivan.

12 Well, one question about the burden of
13 discovery. The sense I get from you is that all of
14 the key witnesses are in Spain. The plaintiffs, in
15 their letter opposing your motion for a stay, say
16 that all of the documents that are at issue here are
17 readily accessible here.

18 And do you agree with that? Do you
19 disagree with that?

20 MR. SULLIVAN: So they may not be
21 physically in the United States. They may be in
22 Spanish servers or, based on the way Reuters sort of
23 structures its businesses, they may actually be in
24 even a third country. But as plaintiffs represent,
25 we are not intending to force them to do subpoena

1 practice or letters rogatory to obtain those
2 documents.

3 To the extent the greater Thompson
4 Reuters Company has those documents, we will produce
5 them as if they were documents held by Reuters U.S.
6 entities.

7 THE COURT: So the documents -- sorry, go
8 ahead, Mr. Sullivan.

9 MR. SULLIVAN: With respect to -- so,
10 yes, that's what I was trying to say. Sorry.

11 THE COURT: The documents can be accessed
12 here from the United States. There's no, at least
13 as far as we know right now, physical document
14 collection that has to occur abroad.

15 MR. SULLIVAN: That's correct. There is
16 one category of documents on some of the assignment
17 fees just because of how far back we go, and we
18 raised this with plaintiff in our conference in
19 advance of this conference. You know, it's possible
20 some of the assignment fee documents are not
21 available electronically. We have not found some of
22 them yet. So if there are paper documents, they
23 would exist in Spain. I don't know if they exist or
24 not, but those would be the paper documents that
25 occur to me that could exist and would be in a

1 Spanish office somewhere.

2 THE COURT: Okay, but the witnesses are
3 abroad, in Spain?

4 MR. SULLIVAN: The witnesses are abroad.
5 Mr. Marchante's supervisors at various times are in
6 Spain, as is the person who calculated the royalty
7 payments and made sure it actually got paid.

8 THE COURT: Okay. Thank you. I
9 appreciate that and your clear explanation of your
10 position.

11 I'd like to come back to Mr. Bartolomei
12 for the plaintiff. And the question I want to pose
13 to you is what prejudice your client will suffer if
14 we have a relatively short period of a stay in
15 discovery? The motion will be fully briefed in a
16 little over a month, and I can't make any promises
17 on my end for as to how quickly I will resolve it.
18 But assuming that I could resolve it in a reasonably
19 expeditious time, what's the harm to your client
20 waiting for the starting gun for a couple of months,
21 maybe three months before the start of discovery,
22 particularly in light of the fact that you've been
23 aware of the conduct underlying the complaint for a
24 few years at this point?

25 MR. BARTOLOMEI: So there's a lot to

1 unpack of what Mr. Sullivan previously mentioned.
2 But I'll focus on what the Court has asked.

3 The prejudice is one, the case in Spain
4 filed against Mr. Marchante, which we're not Spanish
5 lawyers, is such that this is a tactical advantage
6 in which they had equally as much time knowing that
7 this issue was pending.

8 And given the fact that if this is meant
9 to give Reuters a head start in Spain, to
10 potentially try and go adjudicate something where
11 plaintiff does not have the means to fully litigate
12 this issue in Spain will effectively allow Reuters
13 to unfairly control this litigation. Because the
14 fact is, Mr. Marchante hasn't even been served in
15 Spain, and the burden for him to go litigate --

16 So to correct a few misstatements by Mr.
17 Sullivan, Mr. Marchante lives almost nine hours by
18 train from where this court is located, which is
19 effectively, roughly --

20 THE COURT: If I may, Mr. Bartolomei, and
21 I want to allow you to address that. But leave
22 aside the -- I know it's kind of hard to do that,
23 given that it is the reality, but just leaving aside
24 for a moment the other case that's happening, and
25 just the question of -- and I know that the motion

1 is based on forum non conveniens, but is that the
2 only harm to your client, I guess, is what I'm
3 trying to get at. Is there something else that is
4 problematic from your perspective, other than that
5 delaying the start of discovery would prejudice your
6 client in some way?

7 MR. BARTOLOMEI: No, Your Honor. I mean,
8 at the end of the day, prejudice in and of itself is
9 not the end all be all when it comes to the Court's
10 discretionary power to grant a stay or not grant a
11 stay.

12 So to the extent that several months is
13 something that the Court is contemplating, then my
14 client will live with it. I mean, that's just the
15 reality.

16 THE COURT: Okay. I understand. Thank
17 you. And please, I interrupted you, so I want to
18 allow you to continue with the next point that you
19 wanted to make.

20 Mr. Bartolomei, did you hear me?

21 Mr. Bartolomei?

22 MS. MARKERT: Your Honor, this is Pamela
23 Markert, also on behalf of the plaintiffs. I'm not
24 sure what happened.

25 MR. BARTOLOMEI: Your Honor, I'm back on.

1 I don't know why the call dropped.

2 THE COURT: Oh, no worries.

3 MR. BARTOLOMEI: I apologize.

4 THE COURT: No, it's not your fault. So
5 I had said that I had interrupted you. You wanted
6 to make some more points about, I guess, your
7 position that the defendants are forum shopping and
8 what disadvantage that would put your client at to
9 litigate in Spain, I think is where you left off.

10 MR. BARTOLOMEI: Yeah. What I would
11 suggest is that the fact that they've filed a
12 second -- when I say "they," Reuters Spain, not even
13 one of these U.S. Reuters defendants, which they
14 could have easily done that if they believed that
15 they were trying to adjudicate their rights. But
16 putting that aside, filing the second lawsuit in
17 Spain would give them a leg up on plowing forward
18 with that litigation to the detriment of being
19 effectively stuck in the mud here.

20 And I'm sure Your Honor is well aware
21 from the way this game is played, is that if a
22 defendant can stay or stop or pause or delay a case,
23 and there's plenty of case law, you know, that will
24 be put before Your Honor in terms of the prejudice
25 suffered, including the *Paulo* case, including the

1 Wave case that's cited -- *Wave Studio* case that's
2 cited in the defendant's motion to dismiss, that we
3 could be talking about years before this issue --

4 If the Court does decide to punt the case
5 back to Spain, right now all a stay is going to do
6 is give Reuters an advantage in Spain to try to
7 proceed while my client, who has limited means and
8 was not required to put forth all sorts of
9 affidavits in a response to a discovery dispute
10 letter to say, listen, I'm going to be starting
11 behind the eight ball. My case was filed first.
12 We're not getting this moving.

13 I mean, at the end of the day, Your
14 Honor, the docket and getting on his trial calendar
15 is our number one goal as a plaintiff always. And I
16 know the Court was very respectful that, with all
17 the best intentions, we could see a ruling in six,
18 nine months, even a year. I know the Court doesn't
19 have any control over that. And fully respectful
20 that you have a very busy docket with thousands of
21 cases.

22 THE COURT: Well, again, I don't want to
23 make promises on the precise timing in which I can
24 rule on the motion. I haven't seen the opposition
25 yet, and I know I have to weigh the strength of the

1 motion as one of the factors here. And that's a
2 little bit difficult given that I only have one
3 side's take on it at this point. But I feel
4 reasonably confident in telling you that it's not
5 going to be a year before you get an opinion.

6 And I guess, Mr. Bartolomei, are you
7 aware of any case law in which the prejudice
8 asserted by the plaintiff in opposition to a motion
9 for discovery was the possibility of forum shopping
10 that another case might get ahead of the one before
11 the Court where the discovery stay is sought?

12 MR. BARTOLOMEI: Not offhand, but I don't
13 know that case law is going to speak to just the
14 optics of -- plaintiff files a case here in the
15 U.S., and literally 48 hours later, Reuters decides,
16 with all the infinite resources that they
17 practically have, a company that's probably worth
18 \$60 billion-market cap, could go file suit two days
19 later in Spain.

20 So I'm happy to provide the Court that
21 additional supplemental case law to the extent it
22 exists. But this feels like it's gamesmanship at
23 its best and meant to gain a tactical advantage to
24 harm plaintiff, where he's just going to be
25 scrambling to try to defend himself on what is

1 effectively a declaratory relief action in Spain.

2 THE COURT: Your client hasn't been
3 served in Spain yet; is that right?

4 MR. BARTOLOMEI: No. That's correct.
5 And my understanding is that the Spanish courts,
6 having talked to Spanish counsel, you know, because
7 we anticipate that we would put forth the legal
8 standard in Spain, which defendants -- I know the
9 Court hasn't had a chance to look at defendant's
10 motion, but one of the things that we've anticipated
11 is that we're going to have to rely on Spanish
12 counsel.

13 And our understanding that the court
14 system there has been on strike off and on, and one
15 of the quorum nonfactors is, can a litigant get a
16 fair shake at moving his case through that country's
17 court system? And the fact is, is here we are two
18 months later, and he hasn't even been served.

19 THE COURT: Well, Mr. Bartolomei, that
20 suggests to me that if I can resolve the motion to
21 dismiss expeditiously, that it's unlikely that the
22 Spanish case, in the event I were, say, to deny the
23 motion, that the Spanish case would get ahead of
24 this one.

25 MR. BARTOLOMEI: Probably not. But I'm

1 not entirely familiar with the timing in terms of,
2 let's just say hypothetically, my client is served
3 tomorrow, and if he's got to respond within 30 days
4 or whatever, I don't know that. I have to rely on
5 Spanish counsel -- but I don't want to speak out of
6 turn -- but, you know, the fact is that there is
7 going to be a tactical advantage time wise if we're
8 left having to litigate on both fronts.

9 And I think there's actually a more
10 impractical, more important issue here is that,
11 without the benefit of a fulsome response by
12 plaintiff, one of the plaintiff's positions is that
13 the Spanish court is not competent to hear all the
14 claims at issue here. It may be competent to hear
15 the materiality, the breach of contract and
16 termination issue, but, you know, the fact remains
17 is that there is nothing in defendant's moving
18 papers, either in their motion to stay, or their
19 motion to dismiss that speaks to that issue that the
20 Spanish court is even competent to hear U.S.
21 copyright infringement claims other than, oh, Spain
22 has copyright laws.

23 That's just not enough. That's not
24 enough to just put one conclusory line in there.
25 And, you know, at the end of the day, defendant's

1 motion is weak. It's not substantiated because the
2 Spanish court can't hear all the claims there.

3 THE COURT: All right. Mr. Bartolomei,
4 I'll take whatever arguments that you want to make
5 on the merits of the motion to dismiss at the time
6 that you file your opposition.

7 But one thing that you said just confused
8 me a little bit. I thought this was a contract
9 rather than a copyright issue. Am I
10 misunderstanding something?

11 MR. BARTOLOMEI: So the underlying
12 premise, if we back up, plaintiff has pled in his
13 complaints that there is copyright infringement in
14 the U.S. against these Reuters defendants because
15 they do not have a valid license, therefore, it is
16 infringement.

17 This is not a breach of contract case,
18 but the underlying premise to reach infringement is
19 to make a determination that there is a fact
20 question for a jury to decide that a breach
21 occurred, that plaintiff was justifying and
22 terminating it -- of terminating this license, and
23 that, therefore, at that point in time in which the
24 termination is effective, and it's our position that
25 it happened somewhere between April 21 and when this

1 lawsuit was filed, and that's going to be one of the
2 things that Your Honor may have to determine.
3 Defendants make much hay out of all the conduct that
4 happened prior to the termination.

5 But the crux of the argument is that
6 Reuters is going to admit that they didn't pay this
7 guy for a lion's share of the contract. They're
8 going to admit that they never gave the guy royalty
9 payments during the term of the contract. So the
10 whole premise of copyright infringement is premise
11 that defendants don't have a valid license, and that
12 is an affirmative defense that they have to --
13 that's a fact question. It's not appropriate for a
14 motion to dismiss.

15 THE COURT: Okay. Thank you for
16 clarifying. I appreciate that. And I apologize for
17 my confusion.

18 I just want to clarify one other thing.
19 I asked Mr. Sullivan if he agreed with the
20 characterization that the documents are accessible
21 from the United States, but the witnesses are in
22 Spain, and I just want to see if there's consensus
23 on that.

24 Is that your take on discovery as well,
25 that the document collection and review and

1 production can all occur here in the United States,
2 but any actual discovery with respect to live
3 witnesses would have to take place in Spain?

4 MR. BARTOLOMEI: No, plaintiffs do not
5 agree with that characterization. The fact is that
6 almost nothing from the documents that I have in my
7 possession -- I just looked at some this morning --
8 not a single payment for royalties was made from a
9 Spanish entity or a Spanish bank account. It all
10 came from the United Kingdom. In fact, all the
11 transmittals either came from Reuters' employees in
12 London or Reuters' employees in Lisbon, in Portugal.
13 Not even Spain, which is several -- probably 10
14 hours away by train.

15 So at the end of the day, there are no
16 witnesses that are germane to the payment of
17 royalties.

18 Now, one thing Mr. Sullivan also
19 mentioned is the issue of assignment fees.
20 Assignment fees -- maybe I'm missing something here.
21 The assignment fees, which are the daily payments,
22 100 euros or whatever they're paying Mr. Marchante
23 to go take the photographs, which was just a flat
24 rate to go take the photographs, that is not even a
25 piece of evidence that's at issue here as it relates

1 to the breach. There is no claims related to those
2 assignment fees. So that is an absolute red
3 herring. It's irrelevant whether those were paid
4 from Spain or elsewhere.

5 And the fact of the matter is that Mr.
6 Marchante didn't even live in Spain for more than
7 half of the time during his 20-year tenure. So to
8 suggest that there are Spanish photo assignments
9 that gave him -- or photo editors that gave him
10 assignments wherever he was in the world at the time
11 is wholly irrelevant to whether they paid him
12 royalties.

13 THE COURT: I'm sorry. Mr. Bartolomei,
14 I'm sorry, my question, and I may have led you
15 astray, in which case I apologize. I'm just trying
16 to get a sense for where the witnesses are. So Mr.
17 Sullivan says that they're in Spain. You say
18 they're not. Where do you think the witnesses are
19 that are relevant to this case?

20 MR. BARTOLOMEI: So plaintiff's position
21 is that the only relevant witnesses in this entire
22 case is in -- that's in Spain is Mr. Marchante.
23 Determination witnesses, all the communications came
24 from some lawyer in Poland. All the royalty
25 payments came from witnesses that were based in the

1 U.K. All the infringement activity and any
2 communication between U.K. Reuters, Poland Reuters,
3 U.K. would all probably be in New York, where
4 Reuters has a large presence.

5 And as the Court may already be aware,
6 Reuters isn't challenging personal jurisdiction
7 here. So by and large, we're talking about a small
8 universe of electronic documents that can be
9 accessed here in the United States with witnesses,
10 Mr. Marchante, which at the end of the day, we will
11 make him available wherever we have to make him
12 available. And almost no witnesses from plaintiff's
13 perspective that will be disclosed in our initial
14 disclosures, if we get that far today, which we
15 believe we should, are going to show that there's
16 any witnesses in Spain.

17 THE COURT: Okay. Thank you, Mr.
18 Bartolomei.

19 I think I have everything that I need
20 from the parties to resolve the defendant's motion
21 to stay. But I'll just give you an opportunity
22 briefly to raise any other additional points that
23 you want.

24 We just left off with Mr. Bartolomei, so
25 why don't I go to Mr. Sullivan first.

1 MR. SULLIVAN: I just wanted to clarify,
2 Your Honor, on the question of why the assignment
3 fees are relevant.

4 In our view, that goes to whether the
5 breaches were material, if we get to that point,
6 because the assignment fees were, in our view, the
7 most significant portion of the plaintiff's
8 compensation. So it goes to whether the royalty
9 missed payments were actually a material breach, as
10 that term is defined under Spanish law. That's why
11 we think it would be relevant. I mean, even if
12 plaintiff doesn't think it's relevant, we would
13 still be seeking discovery into that area because we
14 think it's relevant to our defense.

15 THE COURT: I understand. Okay.

16 Anything else, Mr. Sullivan?

17 MR. SULLIVAN: No, that's it.

18 Just on the forum shopping position, we
19 think the forum shopping argument is a red herring
20 because both parties agreed when they drafted this
21 contract that the Spanish court in Barcelona was an
22 appropriate forum. It is strange to hear plaintiffs
23 complain about being sued in a jurisdiction he
24 agreed to be sued in for the claims underlying this
25 dispute.

1 So with that, that's all I have to say.

2 THE COURT: Thank you, Mr. Sullivan.

3 Mr. Bartolomei?

4 MR. BARTOLOMEI: Thank you, Your Honor.

5 So obviously, point of contention. Mr.
6 Marchante is well aware that the royalty agreement,
7 and it's really a license, has a forum collection
8 clause that is not exclusive. One of the things
9 that Reuters' Spanish lawyers put was that the
10 Spanish court is the exclusive jurisdiction. So
11 there is knowingly misleading information in that
12 suit that if Mr. Sullivan and counsel here in the
13 U.S. are going to rely on that, I would suggest that
14 they take a hard look, that there's really no merit
15 to that argument.

16 But the more practical argument is that
17 Mr. Marchante is not sophisticated. He does not
18 understand the fact that U.S. federal courts have
19 exclusive jurisdiction over U.S. copyright
20 infringement claims. And I know Your Honor does not
21 have the benefit of the full briefing, but at the
22 end of the day, to the extent that if we look at the
23 *Wave Studio* case, that's a case that got filed in
24 New York, went to Singapore for like four years, and
25 now is finally coming back to adjudicate the U.S.

1 infringement claims.

2 Mr. Sullivan mentioned the *Paulo v.*
3 *Agence France-Presse* and *Getty Images* case. That's
4 a case in which I am one of the lead counsel in that
5 case. And what made that case a little bit
6 different is that there was a pending labor dispute
7 in Portugal at the time that related to the
8 ownership of the photograph, about half of the
9 photographs at issue. And that's a good example of
10 a case in which the Portuguese court is going to be
11 asked to determine whether they can hear U.S.
12 copyright infringement claims.

13 And not to get too far afield, but we
14 believe that the Spanish court is not competent to
15 hear all these claims, and it's not outside the
16 bounds to go file suit in the only and best forum,
17 which is the Southern District of New York for U.S.
18 infringement claims against U.S. defendants.

19 THE COURT: Okay.

20 MR. BARTOLOMEI: And I think that is all
21 for the plaintiffs at this time, unless the Court
22 has any other questions.

23 THE COURT: Okay. Thank you, Mr.
24 Bortolomei. I don't have any other questions. I
25 really appreciate everyone's time. We'll try to get

1 the motion resolved as expeditiously as possible.

2 Thank you, all, very much.

3 MR. BARTOLOMEI: Thank you, Your Honor.

4 MR. SULLIVAN: Thank you, Your Honor.

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C E R T I F I C A T E

I, Adrienne M. Mignano, certify that the foregoing transcript of proceedings in the case of Marchante v. Reuters America LLC, et al; Docket Number: 23CV8864 was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Adrienne M. Mignano
ADRIENNE M. MIGNANO, RPR

Date: December 21, 2023